IN THE SUPREME COURT OF MISSOURI

Case Nos. SC85846 & SC85845

SHAWN C. BROWN

Appellant,

v.

RHONDA F. SHAW, et al.,

Respondents.

Appeal from the Circuit Court of St. Charles County
Case No. 04CV124604
Honorable Lucy D. Rauch

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The Court has original appellate jurisdiction over this case under Article V, Section 3 of the Missouri Constitution. This action is one involving the question of whether Sections 115.346, RSMo., can be applied to disqualify a candidate for office in a fourth class city for being in arrears in taxes or whether those provisions are an unconstitutional regulation of access to the ballot under the free and open elections clause, MO. CONST. ART. I, §25, and the Due Process and Equal Protection clauses of the United State Constitution, U.S. CONST. AMEND. V & XIV, and the Missouri Constitution, MO. CONST. ART. I, § 2. As such, this case involves questions of the validity of Missouri statutes under the United States and Missouri Constitutions.

In addition, the Court has jurisdiction pursuant to Article V, Section 4 of the Missouri Constitution, over the issues in the related mandamus action filed with the Court in Case No. SC85845. Relator Shawn Brown filed his petition in mandamus with the Court following the dismissal of his petition for mandamus in the Circuit Court of St. Charles County, Missouri. Jurisdiction of the mandamus action is with this Court pursuant to Rule 84.22(b) because of the pendency of the related appeal and this Court's jurisdiction over the issues in that appeal. Rule 84.22(b). The Court issued its preliminary writ of mandamus on February 24, 2004, along with its order directing that the brief in the mandamus action (SC85845) be consolidated with the brief on the appeal (SC85846).

STATEMENT OF FACTS

Shawn Brown brought this action to have his name placed on the ballot for mayor of the City of St. Peters, Missouri. [Tr. 62-63] Prior to December 16, 2003, Brown made a decision to run for the office of mayor of the City of St. Peters. [Tr. 63] On December 16, 2003, the opening day for filing for city offices, Brown signed up at the City Clerk's office to run for that position. [Tr. 63, 64] One of his campaign workers went to City Hall at 3:00 a.m. on the morning of the 16th to get in line for candidate filing. [Tr. 63] At 5:00 a.m., Brown showed up and released the campaign worker to go home. [Tr. 63] Brown was the fifth person in line but the first candidate for mayor in the line. [Tr. 63] As the first person in line for the office of mayor, his name would have appeared first on the ballot. [Tr. 64]

At 6:00 a.m., the doors were unlocked for the candidates to enter and register. [Tr. 63, 64] Brown was provided a Notice of Intention to Run for Elective Office form for the office of mayor to fill out to register as a candidate for that office. [Tr. 64; L.F. 118] The document was a single page document. [Tr. 65, 66; L.F. 118] In the middle of the document was a section entitled, "Qualifications," which cited some statutes. [Tr. 65; L.F. 118] Among the statutes cited was § 115.346. [Tr. 84; L.F. 118]

Brown met the qualifications as stated on the form at the time of completing it. [L.F. 65-66, 92] He read the part of the form by which he swore that he held the necessary qualifications for office. [Tr. 92] On December 16,

2003, when he made his oath, he was not in arrears on his taxes. [Tr. 92] There was nothing on the form telling him that he was under any additional obligation other than that stated in the form that he held the qualifications for office on December 16, 2003. [Tr.92-93] The form provided that the candidate held the necessary qualifications, not that the candidate intended to hold them. [Tr. 93; L.F. 118]

Brown completed the declaration of candidacy form in five minutes and filed it with the Clerk's Office at 6:05 a.m. [Tr. 66-67; L.F. 118] He was familiar with the contents of the document so he did not read it thoroughly, but he did spend some of the five minutes he took to complete it in reviewing it. [Tr. 66, 67, 83] He probably had plenty of time to read the document at that point but didn't. [Tr. 84] But he also felt rushed and felt that he did not get an opportunity to read the form on that day. [Tr. 82] Once he completed the form, he was not provided a copy of it but, instead, was given a receipt for payment of the $75 filing fee. [Tr. 67] The receipt was handed to him even before he paid the filing fee. [Tr. 82] At the same time as filing, Brown also signed a Notice to Candidate form which referred to Financial Interest Statements required to be filed by him with the Missouri Ethics Commission. [Tr. 67, 69-70] Brown did not receive a copy of his Notice of Intention to Run for Elective Office until January 26, 2004, when he paid for a copy he obtained from the Clerk's office. [Tr. 67, 70]

Subsequent to filing for office, Brown was mailed a letter and the "Notice to Candidate" from the City Clerk's office. [Tr. 69; L.F. 119-121] The Notice to

Candidate included with the letter was not the same as the Notice of Intent to Run for Elective Office. [Tr. 70; L.F. 118 & 119-121]

Brown did not realize he had a problem with his candidacy until January 20, 2004, when he received a phone call at about 4:50 p.m. from Rhonda Shaw, the City Clerk. [Tr. 68] The Clerk told him she had some bad news for Brown and when he asked her what it was, she read to him the statute about not being in arrears on taxes. [Tr. 68]

The County Collector testified that the Clerk had checked with the County Collector's office about payment of taxes for both Shawn Brown and Thomas W. Brown, a candidate for alderman, but the Collector could not remember the exact date. [Tr. 104, 105] The Collector felt like the Clerk had been checking previously. [Tr. 104] That was a routine thing for cities to do. [Tr. 105] The Notice of Intention to Run for Elective Office of Thomas W. Brown was not filed until 4:44 p.m. on January 20, 2004. Tr. 106; L.F. 157] It probably would have been sometime after 4:44 p.m. on January 20, 2004, that the Clerk would have called with respect to the payment of taxes by Thomas W. Brown. [Tr. 106, 107] The Clerk had checked on the status of tax payments by other candidates prior to the call regarding Shawn Brown and Thomas W. Brown. [Tr. 108] The Clerk had no reason to call the Collector on January 21, 2004. [Tr. 107]

Prior to his conversation with the Clerk, Brown had no idea or indication that his property taxes had not been paid. [Tr. 68] After hanging up with the Clerk, Brown called the County Collector at approximately 4:55 p.m., talked with

someone named Tammy, and asked her whether the taxes had been paid. [Tr. 68, 70] She told him that the taxes had not been paid. [Tr. 68] Brown would have run down and paid his taxes at that point if there had been time. [Tr. 71] However, he became aware of the non-payment too late in the day to do so. [Tr. 71]

Brown was surprised to learn that his taxes had not been paid. [Tr. 70] His wife, who paid the family bills, was also surprised to learn that the taxes had not been paid. [Tr. 74] Brown had been making payments to his mortgage company and assumed that his taxes were being paid by the mortgage company from his escrow account. [Tr. 70-71, 80] His mortgage was with a lender which escrowed his taxes, among other things, for payment of property taxes. [Tr. 71] The deed of trust signed by Brown required him to escrow his taxes on a monthly basis. [Tr. 78; L.F. 135] The payments he was making to the mortgage company reflected an amount being escrowed for payment of real property taxes. [Tr. 79, 80]

Brown contacted his mortgage company to check on the payment of taxes from his escrowed funds. [Tr. 71-72] On his initial call, he was told that it was too late in the day and he would need to call back. [Tr. 72] When he did contact someone from the company who could explain the situation with his tax payments, he was told that the mortgage company takes the position that it had 28 days either before or after the due date to make tax payments. [Tr. 81] In this instance, they were not going to pay the taxes until the end of January. [Tr. 81] Brown had no

role in telling the mortgage company not to pay his real property taxes on time. [Tr. 81]

Brown had not called the County Collector prior to January 20, 2004, to see if his municipal taxes had been paid. [Tr. 85] He did not do this because he assumed payment was taken care of from his escrowed payments to the mortgage company. [Tr. 85] Neither did he check with the city collector. [Tr. 85]

In addition, Brown had not received a tax bill from the County for his real property taxes. [Tr. 74] He did receive a tax bill for his personal property, which was paid at the time the tax bill was received. [Tr. 74]

On January 27, 2004, Brown paid his real estate taxes himself to the County Collector's office. [Tr. 73-74, 88, 101; L.F. 122] Brown does not contest that the payment was late on January 27, 2004. [Tr. 88] The payment would also have been late on January 20, 2004. [Tr. 101] The payment was delinquent as of January 1, 2004. [Tr. 102] The taxpayers listed on the tax receipt for the payment of the real property taxes were Shawn C. Brown and Rhonda R. Brown, of 108 Golden Harvest Court, St. Peters, Missouri. [Tr. 87; L.F. 122] This was the residence of Brown and his wife and they had lived there going on six years. [Tr. 87; L.F. 122]

The County Collector's office generated two types of tax bills or statements, in addition to a receipt for taxes paid: a tax bill and a tax statement. [Tr. 100] A tax bill was yellow in color and sent out in October of the year. [Tr. 100] It contained basically the same information as a tax statement. [Tr. 100] A

tax statement was a document relating to unpaid taxes which would be sent out to someone requesting the statement. [Tr. 99] Both forms would include a code which indicated whether a loan or mortgage company had requested a tax bill or statement. [Tr. 99, 112]

With respect to sending bills to mortgage companies, the Collector's office did not do this at the request or direction of the taxpayer. [Tr. 117] Mortgage information was not generally provided by the taxpayer. [Tr. 117] Instead, the mortgage companies had tax offices which directly requested that the Collector's Office send it bills or statements. [Tr. 117]

The Collector did not know whether the Brown's tax bill had been requested by a loan company for the 2003 real estate taxes. [Tr. 99] By the records of the Collector's office, the responsible taxpayer on the 2002 and 2003 tax bills was Shawn Brown and Rhonda Brown. [Tr. 100] In 2001, the tax bill indicated that a loan company was paying the tax bill. [Tr. 112-13; L.F. 147]

Records from the Collector's office did indicate that, for the 2002 taxes, the tax bill had been addressed to Shawn Brown and Rhonda Brown at their home address. [Tr. 102] The bill was paid by check on December 31, 2002, but the Collector's records do not indicate by whom it was paid. [Tr. 102; L.F. 162] Normally, the receipt would include a code which would show if the tax bill was paid by someone other than the taxpayer. [Tr. 102] The Collector did not believe that there were any such notations in the receipt for the 2002 taxes, which would

indicate that payment for the tax bill for 2002 came from the taxpayer. [Tr. 102-03] However, mortgage companies also pay by check. [Tr. 103]

The year before Brown had run for alderman of the City of St. Peters and signed a similar form. [Tr. 83] He did not read that document at that time. [Tr. 83] He also did not receive a copy of the document at that time or later. [Tr. 91] He does not know whether § 115.346 was even mentioned on that document. [Tr. 91]

Brown did not have any religious, political or philosophical objection to paying taxes. [Tr. 90, 91] He understood that paying taxes was an obligation he has as a citizen and believed that he should pay taxes. [Tr. 91] He did not have any intent to avoid paying his taxes. [Tr. 91] He likewise did not intend for his mortgage company to fail to pay his taxes. [Tr. 91]

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.346, RSMO., APPLIED TO BAR SHAWN BROWN'S CANDIDACY FOR MAYOR OF ST. PETERS, MISSOURI, BECAUSE SECTION 115.346, RSMo., DID NOT APPLY UNDER THE CIRCUMSTANCES TO WORK A FORFEITURE OF SHAWN BROWN'S CANDIDACY IN THAT (a) BROWN'S LATE PAYMENT OF CITY REAL PROPERTY TAXES WAS WITHOUT FAULT OR INTENT ON HIS PART; (b) THE CITY OF ST. PETERS IS A FOURTH CLASS CITY SUBJECT TO THE REQUIREMENTS OF SECTION 79.250, RSMO., AND BROWN COMPLIED WITH THE REQUIREMENTS OF THAT PROVISION; AND (c) SHAWN BROWN WAS NOT THE TAXPAYER OF RECORD FOR THE TAX BILL IN QUESTION.

State ex rel. Haller v. Arnold, 210 S.W. 374 (Mo. banc 1919)

State ex rel. Neu v. Waechter, 58 S.W.2d 971 (Mo. banc 1933)

State ex rel. Equality Sav. & Bldg. Ass'n v. Brown, 68 S.W.2d 55 (Mo. 1934)

§79.250, RSMo.

II.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.346, RSMO., WAS CONSTITUTIONALLY VALID BECAUSE SECTION 115.346, ON ITS FACE AND AS APPLIED BY THE CIRCUIT COURT,

WAS CONTRARY TO MISSOURI'S FREE AND OPEN ELECTIONS CLAUSE, MO. CONST. ART. I, § 25, IN THAT THE FREE AND OPEN ELECTIONS CLAUSE PROTECTS THE RIGHTS OF CANDIDATES TO BE ON THE BALLOT, THE CLAUSE IS VIOLATED WHEN A REGULATION TO ACCESS TO THE BALLOT IS MADE WITHOUT REGARD TO FAULT OF THE CANDIDATE, AND, UNDER THE CIRCUMSTANCES OF THE CASE, THE LATE PAYMENT OF TAXES ON SHAWN BROWN'S RESIDENCE WAS WITHOUT HIS FAULT.

MO. CONST. ART. I, § 25

State ex rel. Haller v. Arnold, 210 S.W. 374 (Mo. banc 1919)

State ex rel. Neu v. Waechter, 58 S.W.2d 971 (Mo. banc 1933)

State ex rel. Equality Sav. & Bldg. Ass'n v. Brown, 68 S.W.2d 55 (Mo. 1934)

III.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.346, RSMO., WAS CONSTITUTIONALLY VALID BECAUSE SECTION 115.346, ON ITS FACE AND AS APPLIED BY THE CIRCUIT COURT, WAS CONTRARY TO THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, MO. CONST. ART. I, § 2, AND U.S. CONST. AMEND. XIV, IN THAT (a) STRICT SCRUTINY APPLIES AND SECTION 115.346 DOES NOT INVOLVE A COMPELLING STATE INTEREST, DOES NOT ADOPT THE LEAST RESTRICTIVE MEANS AND IS NOT NARROWLY TAILORED TO

CARRY OUT ITS INTERESTS, OR (b) SECTION 115.346 IS NOT RATIONALLY RELATED TO THE INTERESTS IT SERVES TO FURTHER.

Deibler v. City Of Rehoboth Beach, 790 F.2d 328 (3rd Cir. 1986)

Hunt v. City of Longview, 932 F. Supp. 828 (E.D. Tex. 1995), *aff'd* 95 F.3d 49 (5th Cir. 1996)

MO. CONST. ART. I, § 2

MO. CONST. ART. I, § 25

ARGUMENT

I.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.345, RSMO., APPLIED TO BAR SHAWN BROWN'S CANDIDACY FOR MAYOR OF ST. PETERS, MISSOURI, BECAUSE SECTION 115.346, RSMo., DID NOT APPLY UNDER THE CIRCUMSTANCES TO WORK A FORFEITURE OF SHAWN BROWN'S CANDIDACY IN THAT (a) BROWN'S LATE PAYMENT OF CITY REAL PROPERTY TAXES WAS WITHOUT FAULT OR INTENT ON HIS PART; (b) THE CITY OF ST. PETERS IS A FOURTH CLASS CITY SUBJECT TO THE REQUIREMENTS OF SECTION 79.250, RSMO., AND BROWN COMPLIED WITH THE REQUIREMENTS OF THAT PROVISION; AND (c) SHAWN BROWN WAS NOT THE TAXPAYER OF RECORD FOR THE TAX BILL IN QUESTION.[1]

Standard of review. The judgment of the trial court will be confirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Jackson*

[1] For the Court's convenience, and to avoid repetition, separate points are not set out to cover the relief in mandamus. For each of the points in the brief, the same argument which makes the circuit court's judgment error also justifies the entry of the mandamus relief under the applicable standards for mandamus.

County Board of Election Commissioners v. Paluka, 13 S.W.3d 684, 688 (Mo. App.2000). Questions of law are reviewed *de novo* by the reviewing court. The trial court found all disputed issues of fact in favor of Shawn Brown, but then determined that, as a matter of law, those facts did not control the outcome. [L.F. 163]

A petition for a writ of mandamus is an original action in the Court, with the Court deciding the case *de novo* from the record before it. Mo. R. Civ. Pro. 84.24(g). A writ of mandamus is the appropriate remedy to compel one governmental official to certify a person as a candidate and another to place that person's name on the ballot. *See, e.g., State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. banc 1983). It can be utilized to compel the undoing of a thing wrongfully and improperly done or to compel the doing of that which is right when wrongfully withheld. *See, e.g., State v. McDonnell*, 426 S.W.2d 11, 14-15 (Mo. banc 1968); *State ex rel. Casey's v. City Council of Salem*, 699 S.W.2d 775, 776 (Mo. App. 1985). It will issue when the relator has established the clear and unequivocal right to relief. *State ex rel. Casey's*, 699 S.W.2d at 776.

A.

Shawn Brown's Circumstance Does Not Come Within §115.346

The City Clerk's refusal to certify Shawn Brown as a candidate for the mayor of the City of St. Peters and the action of the Director of Elections of St. Charles County which followed center on the late payment of the real estate taxes

on the residence owned by Shawn Brown and his wife. Brown does not deny that the real property taxes had not been paid before January 20, 2004.

However, the evidence is clear that this is not a case in which Brown was responsible for those real property taxes not being paid either before January 1, 2004, when they were due, or January 20, 2004, the date on which Section 115.346 purports to cause eligible candidates for municipal office to forfeit their right to be a candidate. Brown pre-paid his taxes to his mortgage company as part of his monthly mortgage payment, which in turn escrowed those payments for payment of the taxes when they came due. [Tr. 70-71, 80] Brown had no say with his mortgage company over when the payments would be made, [Tr. 81], was unaware that the mortgage company made it a policy to wait up to 28 days after the due date to make the payment, [Tr. 70, 74], and had no reason to believe that the mortgage company was not timely making the payment of the 2003 real property taxes. [Tr. 71-72, 85] As the County Collector also made clear, arrangements with the Collector's office for payment of the taxes by the mortgage company was not something that the property owner/taxpayer handled. [Tr. 117] This was a function controlled by the mortgage company. [Tr. 117] In this instance, Brown did not even receive a tax bill for the 2003 real estate taxes, [Tr. 74], in stark contrast to his personal property taxes for that same year which were paid as soon as the bill for those taxes were received from the Collector. [Tr. 74] Like millions of other homeowners who buy their homes through a mortgage

company and are required to pay their taxes into escrow, Shawn Brown relied on his mortgage company to both do what is commercially reasonable and acceptable and what the mortgage company was required by law to do, i.e., to make the mortgage payment and to make it on time.

In short, any late payment of the municipal real estate taxes for 2003 was without the fault, knowledge or intent of Shawn Brown. In addition, as soon as being advised that the tax bill was not paid and the failure of his mortgage company to make the payment as required, Brown made the payment himself at the earliest possible time and well before any action required of the election authority.

The issue of fault is crucial because the circuit court construed Section 115.346 as, essentially, involving a form of strict liability. [L.F. 163] To the court, the only fact which was essential to its determination was that Shawn Brown's city real estate taxes had not been paid on January 20, 2004, the date that filing for the office of mayor closed. [L.F. 163] However, the provision, if applicable at all to the City of St. Peters, does require an element of fault on the candidate/taxpayer in the payment not being made before the close of the date for filing for municipal office if the section is to work a forfeiture of the right to stand for office.

Statutes such as Section 115.346, which regulate access to the ballot, are to be construed, if possible, to prevent the disqualification of candidates. *State ex inf.*

Mitchell v. Heath, 132 S.W.2d 1001, 1004 (Mo. 1939); *Application of Lawrence*, 185 S.W.2d 818, 820 (Mo. 1940); *Chomeau v. Roth*, 72 S.W.2d 997, 999 (Mo. App. 1934). More specifically, provisions which limit access to the ballot by requiring the payment of money by a particular day are to be construed to require fault on behalf of the proposed candidate in the failure to make the timely payment. *State ex rel. Haller v. Arnold*, 210 S.W. 374, 376 (Mo. banc 1919), and *State ex rel. Neu v. Waechter*, 58 S.W.2d 971, 973-74 (Mo. banc 1933). As the court noted in *Haller*, to interpret such a requirement to defeat the candidate from being placed on the ballot without regard to his or her fault in meeting the condition "would so far work a hardship and a denial of free and open elections as to impinge upon constitutional rights." 210 S.W. at 376. As *Neu* added, "independent of the constitutional question, such a construction would be harsh and unreasonable." 58 S.W.2d at 973. The rule as stated by *Haller* is: if the proposed candidate, without fault on his behalf, fails to make payment and obtain a receipt for that payment by the date set out in the statute, "all that should be required is the earliest possible payment and obtention and filing thereafter of such receipt, provided such filing of the receipt shall be in time to allow of the performance of the board of election commissioners of the very first of the ensuing duties incumbent upon them by law." 210 S.W. at 376.

The facts here are undisputed that Shawn Brown is without fault in the failure to pay the tax bill by January 20, 2004. Brown's mortgage agreement required him to escrow his taxes with his mortgage company. [Tr. 78; L.F. 135]

He did in fact do this and had the monies to pay the tax bill on hand with his mortgage company on or before the January 1 due date for the taxes and the January 20 cut-off date found in Section 115.346, RSMo. [Tr. 70-71, 80] Not only should Brown be able to rely on his mortgage company to timely pay the tax bill under the terms of the mortgage agreement, state law and federal law requires the mortgage company to do so. § 443.453, RSMo.; 24 CFR 3500.17(k). If it fails to do so, it is the mortgage company, and not Brown, who is ultimately liable for any assessment of penalty and interest. *Id.* In addition, Brown was totally unaware that the mortgage company had not paid the tax bill until being advised by the City Clerk of the fact on January 20, 2004, at a time too late in the day to make the payment himself on that day. [Tr. 68] After confirming the default of the mortgage company, Brown immediately paid the tax bill himself. [Tr. 73-74, 88, 101]

It was suggested below by the Attorney General that Section 115.346 should not be construed to require that arrearage in taxes be without fault on the part of the candidate seeking to run for office, seeking to distinguish *Haller* and *Neu* on the basis that the two candidates sought to pay their required fees in a timely manner but those attempts were thwarted either directly or indirectly. The same can be said here: Brown deposited his tax payments with his mortgage company throughout the year with each monthly mortgage payment. He had done everything he was required to do under his mortgage documents to see that the taxes were paid and had, in fact, pre-paid a sufficient amount to cover the payment

of the tax bill. As noted above, his mortgage company was obligated by contract, by state law and by federal law to make these payments on his behalf. Brown's good faith attempt to pay his taxes prior to January 1, 2004, were no less thwarted than were the candidates in *Haller* and *Neu*.

Respondent Shaw seemingly argued below that Brown should still be kept off the ballot because he is ultimately liable for the payment or non-payment of the taxes by his mortgage company. The problem with this argument is that even though Brown may be responsible under the tax statutes for the payment of his taxes, he is not ultimately liable for late interest and penalty charges when he has timely escrowed his taxes with the mortgage company. § 443.453, RSMo.; 24 CFR 3500.17(k). Clearly, the law imputes responsibility for the late payment in that instance to the mortgage company and not the taxpayer. As noted below in the discussion of the constitutional issues, no real purpose behind a statute such as Section 115.346 is served if it is applied without regard to the fault of the taxpayer in the late payment of taxes.

In short, this case comes within the rule laid down in *Haller*: (i) the non-payment of the tax bill was without the fault of Shawn Brown; (ii) he made the earliest possible payment on discovering the default in payment and the reason for that default; and (iii) he made payment in ample time before the election authority was required to take any action with respect to the ballot for the office of mayor. Section 115.346 cannot be held up as a reason for not certifying Shawn Brown as a candidate for the office of mayor or for withholding his name from the ballot.

In giving Section 115.346 a strict liability interpretation, the circuit court improperly construed the statute. When properly construed, it is clear that the statute does not apply to work a forfeiture of Shawn Brown's candidacy.

B.

Section 115.346 Is Inapplicable to Fourth Class Cities

In refusing to certify Brown, the City Clerk relied solely on the provisions of Section 115.346. That section does not apply to Brown, or any other candidate for office in a fourth class city, such as St. Peters. By the terms of chapter 115, Section 115.346 does not apply to candidates for city office. Section 115.305 creates a subchapter related to political parties and nomination of candidates that is comprised of Sections 115.305 to 115.405. § 115.305, RSMo. Clearly, Section 115.346 comes within this subchapter. That subchapter, however, "shall not apply to candidates for special district offices, township offices in township organization counties, or city, town and village offices[.]" *Id.* (emphasis added).

Nor does the introductory phrase, "Notwithstanding any other provisions of the law to the contrary" found in Section 115.346 make it applicable to fourth class cities or, for that matter, any other governmental entity not within the subchapter comprised of Sections 115.305 to 115.405. As was stated in *State ex rel. Casey's General Stores, Inc. v. City of West Plains*, 9 S.W.3d 712, 717 (Mo. App. 1999), "[t]he term 'notwithstanding,' however, does not necessarily mean that it is to the complete exclusion of all other statutory provisions." It must be read in the context of the whole act in which it is found. *Id.*

The phrase "notwithstanding any other provisions of the law to the contrary" in the context of Section 115.346 refers not to any and all elections for local government office but only to those governmental entities that were otherwise subject to and within Sections 115.305 to 115.405. Rather than scour the statutory provisions applicable to the entities already subject to Sections 115.305 to 115.405 to amend each of those on an individual basis (and risk omitting one or two), the legislature chose to use the language "notwithstanding any other provisions of the law to the contrary" to accomplish that end in a single stroke.

There is nothing in the language of Section 115.346 to indicate that it was intended to work an implicit repeal of the provisions of Section 115.305, the end result of interpreting Section 115.346 to apply to any and all local governments elections, including those of fourth class cities. Repeals by implication are disfavored in the law. *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). Perhaps most telling that Section 115.346 was not intended to have application beyond those entities already within the scope of Sections 115.305 to 115.405 was the legislature's later enactment of Section 71.005, RSMo. The enactment of this statute would have been totally superfluous if Section115.346 had been intended to apply to those governmental entities which came within Section 71.005.[2]

[2] As shown below, Section 71.005 does not apply to fourth class cities which have their own specific provision concerning the payment of taxes. §79.250, RSMo.

Even if Section 115.305 did not exist to limit the application of Section 115.346, Section 79.250, RSMo., which is specifically applicable to fourth class cities, renders Section 115.346 inapplicable. Section 79.250, provides:

> **79.250. Officers to be voters and residents – exceptions.** All officers elected to offices or appointed to fill a vacancy in any elective office under the city government shall be voters under the laws and constitution of this state and the ordinances of the city except that appointed officers need not be voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed officers shall be residents of the city.

§ 79.250, RSMo. (emphasis added). As this specific statute dealing with fourth class cities shows, the relevant time for determining whether a candidate for a fourth class city office is in "arrears" for taxes is the date of the election, not the date of the closing of filing for the office. *In re: Williams*, 943 S.W.2d 244, 245 (Mo. App. 1997). It is undisputed in this case that Brown paid the tax bill for city real estate taxes on January 27, 2004, and that the election for office of mayor of the City of St. Peters will not be held until April 6, 2004, a time yet in the future.

Neither does the general statute found at Section 71.005 somehow override the more specific provisions applicable to fourth class cities set out in Section 79.250. Almost fifty years ago, the Court of Appeals held that when a special statute applicable to fourth class cities exists, its provisions control over other provisions found in statutes applying only generally to cities and/or political

subdivisions as a whole. *Bauer v. City of Berkely*, 282 S.W.2d 154, 160-61 (Mo. App. 1955). *See, also*, *Westbrook v. Board of Education*, 724 S.W.2d 698, 701 (Mo. App. 1987)(statutes dealing with school districts in general give way to statutes dealing specifically with metropolitan school districts). The specific provision relating to fourth class cities found in Section 79.250 controls over the contrary provision applicable to all municipal offices contained in Section 71.005.

It is also immaterial that Section 71.005 was enacted subsequently to Section 79.250. As noted above, repeals by implication are disfavored. *Silcox v. Silcox*, 6 S.W.3d 899, 903 (Mo. banc 1999). More importantly, the principle that the specific statute controls over the more general one still has application in this instance. The principle has been expressed particularly aptly in *State ex rel. Equality Sav. & Bldg. Ass'n v. Brown*, 68 S.W.2d 55, 59 (Mo. 1934)(emphasis added), the Court noting, "'Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'" Thus, in this instance, since Section 71.005, the general statute is later in time, Section 79.250 is to be construed as remaining an exception to its terms.

The language of Section 71.005 points to this result. That section states, "No person shall be a candidate for municipal office unless such person complies with the provisions of section 115.346, RSMo., regarding payment of municipal taxes or user fees." The legislature has used no language to suggest that it

intended to override the principle set out in *State ex rel. Equality Sav. & Bldg. Ass'n v. Brown* or that it intended Section 71.005 to work an implicit repeal of the provisions of §79.250.

Nor should Section 115.346 be considered a mere refinement of, or supplement to, Section 79.250. The relevant language in Section 79.250, RSMo., is that "No person shall be elected . . . to any office." Section 79.250 by its language clearly applies to the right to stand for election for the office as a candidate, the same as Section 115.346. Otherwise, the language in the statute would have stated, "No person may take office." That Section 79.250 refers to the qualification to be a candidate is made clear by *In re: Williams*, 943 S.W.2d 244 (Mo. App. E.D. 1997), in which the challenge was a pre-election challenge to the inclusion of the person's name on the ballot. Thus, Section 115.346, RSMo., is not a refinement to Section 79.250. Nor was the subsequent enactment of Section 115.346 an abrogation of the decision in *In re: Williams*. That decision remains valid law as applies to fourth class cities and to Shawn Brown's circumstance, in particular. It is in direct contrast to it and, if allowed to be applied to fourth class cities would work an implicit appeal of Section 79.250.

Section 79.250 was the only section applicable to Shawn Brown's candidacy for the office of mayor of the City of St. Peters. He complied with those provisions and was entitled to be certified as a candidate for that office and to have his name placed on the ballot. The circuit court erred in applying Section 115.346 at all in working a forfeiture of Brown's candidacy.

C.

Shawn Brown Not Taxpayer of Record

Shawn Brown similarly could not be disqualified for the non-payment of the tax bill in question because the property being assessed is jointly owned and the tax bill is not in his name. [Tr. 100] The ownership of the property and the tax bill are both titled in the name of Shawn C. Brown and Rhonda R. Brown. [L.F. 122] As the City Clerk argued below, the joint ownership is, in fact, a separate entity. In addition, as shown *infra*, Shawn Brown cannot be individually liable for the real estate taxes at issue.

The statute is to be construed, if possible, in a manner to prevent the disqualification of candidates. *State ex inf. Mitchell v. Heath*, 132 S.W.2d 1001, 1004 (Mo. 1939); *Application of Lawrence*, 185 S.W.2d 818, 820 (Mo. 1940); *Chomeau v. Roth*, 72 S.W.2d 997, 999 (Mo. App. 1934). Section 115.346, RSMO. refers to unpaid city taxes of the person seeking to run for office. Shawn C. Brown and Rhonda R. Brown, as joint tenants are not seeking the office of mayor of the City of St. Peters. The fact that this separate entity, i.e., a person comprising this joint tenancy, may not have paid its tax bill by January 20, 2004, does not disqualify the individual person – Shawn C. Brown – from being a candidate for office under the terms of Section 115.346.

Below, both the City Clerk and the Attorney General argued that one purpose of Section 115.346 is to enforce the tax laws of the state. However, there is nothing in the language of Section 115.346, RSMo., to suggest that it is intended

or directed to the enforcement of the tax liability of one person through the coercion of another who might be in a joint legal relationship with that person.

The City Clerk also argued that Shawn C. Brown, as a joint owner of the property being taxed, is individually liable for the tax liability sought to be enforced by the City through Section 115.346. In part, this argument was based on the wording of Section 137.075, which she believes is applied to cities by virtue of Section 94.310, RSMo. The City Clerk arrives at this position by omitting the second part of the statute. The statute as a whole reads:

> The enforcement of all taxes authorized by sections 94.190 to 94.330 shall be made in the same manner as is provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure of goods and chattels after the taxes become delinquent. Where applicable in chapter 140, RSMO., the term "county" shall be construed "city", the term "county clerk" shall be construed "city clerk", and the term "county collector" shall be construed "city collector" or other proper officer collecting taxes in the city.

§ 94.310, RSMo. (emphasis added). It should be noted that Chapter 139, RSMo., refers to the payment and collection of current taxes and Chapter 140 (as indicated in Section 94.310) to the enforcement of late taxes. Nothing in chapter 137 is incorporated by reference with respect to fourth class cities by Section 94.310.

More significant is the error concerning Shawn Brown's individual liability for the tax bill in question. Section 140.150.2, provides that the Brown residence

is not subject to sale for back taxes unless the notice of the sale contains the names of all of the record owners, not just one. §140.150.2, RSMo. In addition, a subsequent section in chapter 140 states, "Nothing in this chapter contained shall be construed to authorize a personal judgment against any owner of any land or lot, or of any interest therein, for any real estate tax levied and/or assessed against such land or lot[.]" § 140.640, RSMo. Shawn Brown cannot be individually liable for the taxes on his property and, thus, cannot be individually in arrears for the joint tax bill on which the City Clerk relied to disqualify him from running for office. Section 115.346, RSMo., does not apply to him in this instance. The trial court erred in concluding that Shawn Brown could forfeit his candidacy for mayor because the tax bill of Shawn and Rhonda Brown had not been paid.

II.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.346, RSMO., WAS CONSTITUTIONALLY VALID BECAUSE SECTION 115.346, ON ITS FACE AND AS APPLIED BY THE CIRCUIT COURT, WAS CONTRARY TO MISSOURI'S FREE AND OPEN ELECTIONS CLAUSE, MO. CONST. ART. I, § 25, IN THAT THE FREE AND OPEN ELECTIONS CLAUSE PROTECTS THE RIGHTS OF CANDIDATES TO BE ON THE BALLOT, THE CLAUSE IS VIOLATED WHEN A REGULATION TO ACCESS TO THE BALLOT IS MADE WITHOUT REGARD TO FAULT OF THE CANDIDATE, AND, UNDER THE

CIRCUMSTANCES OF THE CASE, THE LATE PAYMENT OF TAXES ON SHAWN BROWN'S RESIDENCE WAS WITHOUT HIS FAULT.

Standard of review. The judgment of the trial court will be confirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684, 688 (Mo. App.2000). Questions of law are reviewed *de novo* by the reviewing court. The trial court found all disputed issues of fact in favor of Shawn Brown, but then determined that, as a matter of law, those facts did not control the outcome. [L.F. 163]

A petition for a writ of mandamus is an original action in the Court, with the Court deciding the case *de novo* from the record before it. Mo. R. Civ. Pro. 84.24(g). A writ of mandamus is the appropriate remedy to compel one governmental official to certify a person as a candidate and another to place that person's name on the ballot. *See, e.g., State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. banc 1983). It can be utilized to compel the undoing of a thing wrongfully and improperly done or to compel the doing of that which is right when wrongfully withheld. *See, e.g., State v. McDonnell*, 426 S.W.2d 11, 14-15 (Mo. banc 1968); *State ex rel. Casey's v. City Council of Salem*, 699 S.W.2d 775, 776 (Mo. App. 1985). It will issue when the relator has established the clear and unequivocal right to relief. *State ex rel. Casey's*, 699 S.W.2d at 776.

Argument. Article I, Section 25 of the Missouri Constitution guarantees the right of free and open elections. MO. CONST. ART. I, § 25. The section has been applied in two types of situations and is considered as protecting two separate interests: the rights of voters to participate in the electoral process, *see, e.g., Priesler v. Calcaterra*, 243 S.W.2d 62 (Mo. banc 1951), and the rights of candidates to stand for elections. *See, e.g., State ex rel. Haller v. Arnold*, 210 S.W. 374 (Mo. banc 1919); *State ex rel. Neu v. Waechter,* 58 S.W.2d 971 (Mo. banc 1933). This case involves the protections afforded a candidate for office and should not be confused with the type of analysis which might be undertaken if voters rights were at issue.[3]

As noted in the statutory construction argument under Point I, *supra*, *Haller* and *Neu*, candidate protection cases, have particular application to the circumstances presented here. As *Haller* specifically noted, the guarantee that "all elections shall be free and open," MO. CONST. ART. I, § 25, applies to conditions placed on candidacy for office. 210 S.W. at 376. *Haller* was very clear in its

[3] Below, the Attorney General and City Clerk argued that Article I, Section 25 was not violated because Section 115.346 did not restrain or coerce a voter or diminish the strength of the voter's vote, a clear voter's right argument. What they failed to explain is what relevance and application the voter protection prong of the constitutional guarantees of Article I, Section 25 has to the separate and independent candidate protection prong.

interpretation of the reach of Article I, Section 25 as it applied to circumstances indistinguishable from this case. An absolute requirement of a statute which conditions candidacy on circumstances over which the candidate has acted without fault violates the constitutional guarantee. *Id.* "Such a view would inevitably restrict and circumscribe the right of a citizen to be a candidate for office within such limits and hedge the privilege about [sic] with such conditions as materially to impinge upon the guarantee of the Constitution that 'all elections shall be free and open.'" *Id. Concur Neu*, 58 S.W.2d at 973. The condition placed on a candidate here, the payment of municipal taxes by a particular date, is no different from the condition placed on a candidate in *Haller* and *Neu* to also pay a sum of money by a particular date or forfeit the right to run as a candidate for office.

Nor is Section 115.346 to be viewed as an eligibility requirement related to the office, such as the durational residency requirement for county prosecuting attorneys upheld in *State ex rel. McElroy v. Anderson*, 813 S.W.2d 128, 129 (Mo. App. 1991). There is a fundamental difference between the residency requirement for county prosecuting attorneys and the condition placed on candidacy by Section 115.346. The residency requirement in *McElroy* involved a fitness requirement to hold the office throughout the term of office, not the right to be a candidate for the office in the first instance. Section 115.346, in contrast, works a <u>forfeiture</u> of the right to run for office from someone qualified to hold the office in every respect. As will be shown in more detail in the argument on the Equal Protection clause, it is also a forfeiture that is totally unrelated to fitness for the office in question, i.e.,

a person who is elected to city office does not forfeit that office or become subject to removal for non-payment of municipal taxes during the term of office.

As recognized in particular in *Haller*, because the condition of the type presented in Section 115.346 does work an absolute forfeiture of the right to run for office, it must be construed to require fault on the part of the potential candidate in failing to meet the condition. To the extent that Section 115.346, as construed and applied by the circuit court, is without consideration of the fault of Shawn Brown in the late payment of the tax bill, it violates Article I, Section 25 and is invalid. The circuit court erred in upholding the constitutionality of the provision.[4]

III.

THE TRIAL COURT ERRED IN HOLDING THAT SECTION 115.346, RSMO., WAS CONSTITUTIONALLY VALID BECAUSE SECTION 115.346, ON ITS FACE AND AS APPLIED BY THE CIRCUIT COURT, WAS CONTRARY TO THE EQUAL PROTECTION CLAUSES OF THE MISSOURI AND UNITED STATES CONSTITUTIONS, MO. CONST. ART. I, § 2, AND U.S. CONST. AMEND. XIV, IN THAT (a) STRICT

[4] As the Attorney General pointed out in argument before the circuit court, the only operative provision for constitutional purposes is Section 115.346. [Tr 10] Section 71.005 of the Revised Statutes and the corresponding provision of the City Code of St. Peters are not substantive provisions.

SCRUTINY APPLIES AND SECTION 115.346 DOES NOT INVOLVE A COMPELLING STATE INTEREST, DOES NOT ADOPT THE LEAST RESTRICTIVE MEANS AND IS NOT NARROWLY TAILORED TO CARRY OUT ITS INTERESTS, OR (b) SECTION 115.346 IS NOT RATIONALLY RELATED TO THE INTERESTS IT SERVES TO FURTHER.

Standard of review. The judgment of the trial court will be confirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684, 688 (Mo. App.2000). Questions of law are reviewed *de novo* by the reviewing court. The trial court found all disputed issues of fact in favor of Shawn Brown, but then determined that, as a matter of law, those facts did not control the outcome. [L.F. 163]

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banc 1968); *State ex rel. Casey's v. City Council of Salem*, 699 S.W.2d 775, 776 (Mo. App. 1985). It will issue when the relator has established the clear and unequivocal right to relief. *State ex rel. Casey's*, 699 S.W.2d at 776.

A.

Strict Scrutiny Applies

The circuit court determined that the rational basis test, rather than the strict scrutiny test, applied with respect to the Equal Protection clause issues being considered in this case. The court's error was three-fold: (1) it completely ignored the fundamental right that Missourians enjoy under Article I, Section 25 of the Missouri Constitution of free and open access to the ballot, (2) it ignored that Section 115.346 must satisfy not only the Equal Protection clause of the United States Constitution, but the Equal Protection clause of the Missouri Constitution as well, and (3) it either overlooked or ignored prior Missouri case law which has held that candidate access-to-the-ballot cases are to be reviewed under the strict scrutiny standard.

Limitations regulating access to the ballot implicate rights under the First and Fourteenth Amendments to the United States Constitution, and the equal protection and due process clauses of the Missouri Constitution. *Jackson County Board of Election Commissioners v. Paluka*, 13 S.W.3d 684, 689 (Mo. App. 2000). As noted in the previous section, they also implicate rights of the candidate under Article I, Section 25 of the Missouri Constitution which require all elections

to be free and open. *State ex rel. Haller v. Arnold*, 210 S.W. 374, 376 (Mo. banc 1919). Under the circumstances:

> As a matter of constitutional law, any state law regulating access to the ballot must be shown by the state to be necessary to serve a compelling interest. Also, when there is a compelling interest, the state must utilize the least restrictive means in achieving its ends. The court will apply strict scrutiny in determining whether a regulation involving access to the ballot is constitutional.

Paluka, 13 S.W.3d at 689 (emphasis added).

Equal protection analysis first looks to whether the legislation either creates a suspect class or "impinges on a fundamental right." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991); *Mullenix v. St. Charles Properties, L.P. v. City of St.* Charles, 983 S.W.2d 550, 559 (Mo. App. 1998) "A fundamental right under this analysis is a right explicitly or implicitly guaranteed by the constitution such as the rights to free speech, to vote, to travel interstate, as well as other basic liberties." *Mullenix*, 983 S.W.2d at 559. A law which impinges on a fundamental right "is presumptively invalid because it impinges upon a substantive right or liberty conferred by the constitution, whether or not its purpose is to create any classification." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 512 (Mo. banc 1991).

When Missouri has considered the issue of candidate access to the ballot, it has consistently applied a strict scrutiny analysis. *Paluka*, 13 S.W.3d at 689;

Laborer's Educational and Political Club Independent v. Danforth, 561 S.W.2d 339, 348 (Mo. banc 1978); *State ex rel. Coker-Garcia v. Blunt*, 849 S.W.2d 81, 85 (Mo. App. 1993). Missouri is necessarily unique in judicial analysis of election law issues. Federal and foreign jurisdictions are of limited value in reviewing candidacy forfeitures such as found in Section 115.346 because of the presence of the Article I, Section 25, guarantee of free and open elections in the Missouri Constitution. The United States Constitution contains no such provision. Because the Missouri Constitution explicitly recognizes a right to candidacy under Article I, Section 25, i.e., "a substantive right or liberty conferred by the constitution," *Id.*, and Section 115.346 seeks to regulate that right, a fundamental right is implicated. What the circuit court appears to have failed to recognize in its decision is that, regardless of whether the right to candidate access to the ballot is a fundamental right under the federal constitution for purposes of Fourteenth Amendment analysis, it is a fundamental right bestowed under the Missouri Constitution for purposes of the Equal Protection clause of Article I, Section 2 of the Missouri Constitution.

Thus, the Court must begin with the presumption that Sections 115.436 and 71.005, RSMo. are invalid and cannot be applied to Shawn Brown. It is incumbent upon the City to establish the validity of the provisions by showing a compelling state interest involved, that the statute utilized the least restrictive means in achieving this end, and that it is narrowly tailored to its purpose.

The four interests that have been posited as underlying Section 115.346 can hardly be considered compelling in a constitutional sense. These four interests are that the provision promotes the candidacy of law-abiding lawmakers; helps limit candidates to those possessing a high degree of commitment to the city; reduces public cynicism towards government; and assists cities in the enforcement of their tax codes. Thus, the first merely seeks to encourage a higher class of candidate without any evidence that municipal governments are in danger of political ruin without this higher class of candidate; the second seeks a candidate with a particular viewpoint, i.e., a person that is committed to furthering the city and, thus, is not content neutral; the third is not addressed to candidates at all, but to those candidates who succeed; and the fourth is concerned with a subject that, at least with the taxes at issue, are the subject of two chapters in the tax code, chapters 139 and 140, RSMo., without any showing of an abysmal (or any) failure or ineffectiveness of these two chapters to collect delinquent real estate taxes or that candidates for public office are a principal source of delinquent tax collections for local governments.

Further, neither the City Clerk nor the Attorney General have shown how Section 115.346 has used the least restrictive means to achieve these ends or narrowly tailored them for their purpose, particularly in the circumstances of this case where the candidate-taxpayer acted in good faith in escrowing his funds with his mortgage company and acted without fault or intention in the late payment of the tax bill. The evil that the Attorney General and City Clerk point to as being

addressed by Section 115.346 is the "scofflaw" candidate who neither cares to pay his or her city taxes on time nor makes provision for that payment. Section 115.346 sweeps too broadly in snaring the innocent candidate along with the scofflaw. If all four interests were truly somehow furthered by the payment of municipal taxes by candidates for city office, it would seem patent that the same result could be achieved by notice to the candidate and a reasonable opportunity to cure the delinquency before unceremoniously removing his or her name from the ballot. Indeed, it is probably because such a less restrictive, more narrowly tailored means is so obvious that the Attorney General and the City Clerk have resisted the application of the strict scrutiny test.

B.

Section 115.345 Is Invalid Under the Rational Relationship Test

Even if strict scrutiny does not apply, Section 115.346 still violates the Equal Protection clauses of the Missouri and United States Constitutions. In striking down a similar requirement on equal protection grounds applying the rational relationship test, the Third Circuit stated:

> Today we consider the restriction of tax delinquency as an additional threshold qualification for an elected official. Tomorrow's restriction may concern failure to pay federal or state taxes. Thereafter, candidacy may be conditioned on municipal obligations such as sewer assessments, parking fines, dog law violations, jaywalking and other minor infractions. None of these potential qualifications bear on a candidate's maturity, intelligence, knowledge of the

community, ability to recognize and solve community problems. Each new qualification decreases a voter's choice and consequently harms democratic government.

Analysis of equal protection and our understanding of the legitimate interests of society counsel that candidacy conditioned on the payment of taxes is inimical to democratic government.

Deibler v. City of Rehoboth Beach, 790 F.2d 328, 336-37 (3rd Cir. 1986). *See, also, Hunt v. City of Longview*, 932 F. Supp. 828, 841 (E.D. Tex. 1995)("Keeping current with one's tax liabilities is not necessarily a mark of good citizenship" and "If the voters of Longview decide they do not wish to be represented by those who are delinquent in paying city taxes, they can do so at the ballot box"). While the 6th Circuit subsequently upheld a statute similar to the Missouri one as being rationally related to the state's interest in collecting its taxes, *Corrigan v. City of Newaygo*, 55 F.3d 1211 (6th Cir. 1995), this position was correctly rejected as irrational in *Hunt v. City of Longview*, 932 F. Supp. 828, 841 (E.D. Tex. 1995), *aff'd* 95 F.3d 49 (5th Cir. 1996): "If the City needs to collect on liabilities owed to it, let it do so as it would against any other citizen who is in arrears to the City. Removing one from office for failure to pay taxes and fees, all for the touted purpose of administering the tax system, without ever attempting to collect on the liabilities owed, is irrational. The court concludes that Section 2.03(e) of the Longview City Charter is not rationally related to the interest of the administration of the tax system."

No case has been found which has followed *Corrigan* since it was decided in 1995. Of additional significance to the analysis here, *Corrigan* upheld the statute solely as a tax collection measure. 55 F.3d at 1216. It implicitly agreed with both *Diebler* and *Hunt* that the other "legitimate interests" being advanced here by the Attorney General and the City Clerk do not survive even a rational basis analysis.

Diebler and *Hunt* have even stronger application in Missouri where Article I, Section 25 recognizes a right to free and open elections and where payment of city taxes has no relationship to holding an elective office in a fourth class city. In other words, timely payment of taxes is not a qualification for holding any elective office in a fourth class city, including mayor, §§ 79.070 & 79.080. Nor does an elected city official forfeit his office or become subject to removal for failure to timely pay city real property taxes. §79.240, RSMo.; *Boyer v. City of Potosi*, 77 S.W.3d 62, 71-72 (Mo. App. 2002)(removal for cause involves only those actions which relate to and affect the administration of the office to which the person is elected). Sections 115.436 and 71.005, RSMo., are not related (rationally or otherwise) to any interest put forth by the Attorney General and the City Clerk. They merely serve as an impediment to being a candidate for public office and unduly restrict the voters' choice of candidates for elective office.

As noted above in the discussion of the strict scrutiny test, the three non-tax collection interests advanced by the Attorney General and City Clerk are properly characterized as addressed to discouraging "scofflaws" from being candidates for

office. It is unnecessary here to determine whether there is a rational relationship between Section 115.346 and this anti-scofflaw interest (a question answered in the negative by *Diebler, Hunt* and *Corrigan*) because Shawn Brown does not fit within the category of a scofflaw.

In terms of an as applied analysis, the interest of seeking law-abiding lawmakers as candidates is clearly not furthered by a provision which ensnares the demonstrably law abiding citizen who prepaid his taxes to his mortgage company under a commercially recognized and reasonable method of paying taxes into escrow to the mortgage company and relying on the mortgage company to meet both its contractual and legal obligations to make timely payment of the taxes from the escrowed funds. Nor is the interest of limiting the pool of candidates to those who possess a high degree of commitment to the city. Assuming that a high degree of commitment to the city is illustrated by the payment of one's taxes, clearly, Shawn Brown possessed this high degree of commitment. He made the payments of his taxes to his mortgage company as he was required under his mortgage agreement and allowed by law. Trapping the innocent taxpayer by the provisions of Section 115.346 also does not further any interest in decreasing public cynicism towards government. Public cynicism towards government is directed at intentional conduct and the placement of personal interest over public interest by those who hold office. This is not one of those situations. Instead, a provision such as Section 115.346, which traps the innocent along with the scofflaw, actually increases cynicism because it emphasizes to the public that there

are arbitrary and artificial barriers to running for office that are only understood by and designed to benefit incumbent politicos at the expense of political outsiders who seek to participate in local politics.

The circuit court upheld Section 115.346 because it believed the provision imposed no additional burden on candidates for public office not imposed on non-candidates. [L.F. 163a] However, this is clearly not so. If, as the Attorney General and City Clerk contend, Section 115.346 is a tax collection measure, then only candidates for municipal office are burdened with this tax collection measure. While all other taxpayers and candidates for non-municipal offices are burdened only with the tax collection enforcement tools of Chapter 140, RSMo., the candidate for municipal office is subjected to the additional tax enforcement measure of Section 115.346 as a condition to the person exercising his or her fundamental right to access to the ballot as a candidate.

When viewed as a tax collection measure, by creating these classifications and distinctions not only between the municipal candidate and the everyday taxpayer and the municipal candidate and the candidate for other office in the state, Section 115.346 violates the Equal Protection clause. Singling municipal candidates out for special tax enforcement measures is totally arbitrary if the interest is the collection of taxes. Neither the circuit court, the Attorney General nor the City Clerk can point to any reason why additional tax enforcement measures beyond those already in place under Chapter 140 are required to obtain payment of municipal taxes from candidates for office. Nor can they point to any

reason for applying the draconian solution of forfeiture of one's candidacy for municipal office to a person such as Shawn Brown who had prepaid the taxes in question to his mortgage company and was totally unaware that the mortgage company had failed in both its contractual and legal obligation to make the payments when due. Such arbitrary classifications related to taxation are themselves invalid under the Equal Protection clauses of both the state and federal constitutions. *Southwestern Bell Telephone Co. v. Morris*, 345 S.W.2d 62, 68-69 (Mo. banc 1961); *City of St. Louis v. Western Union Telegraph Co.*, 760 S.W.2d 577, 583-84 (Mo. App. 1988).

The Attorney General and the City Clerk have also argued that Section 115.346 is subject to an intermediate level of scrutiny under a balancing test as set out in *Anderson V. Celebrezze*, 460 U.S. 780 (1983). In terms of the level of analysis to be applied under the balancing test, when the constitutionally protected rights sought to be enforced are subject to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance, but if the state election law imposes only reasonable, non-discriminatory restrictions on those constitutional rights, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* at 788. This latter statement has been described as applying a rational basis test. *See, e.g., Johnson v. Administrative Office of the Courts*, 133 F. Supp.2d 536, 539 (E.D. Ky. 2001). As shown under this Point, Section 115.346 cannot satisfy the rational

basis test under traditional Equal Protection analysis. It similarly must fail the *Anderson v. Celebrezze* balancing test.

Section 115.346, RSMo. is unconstitutional and invalid. It cannot be enforced against Shawn Brown as a means to refuse to certify him as a candidate for the office of mayor or to keep his name off the ballot for the election for that position. The circuit court erred in upholding the constitutional validity of Section 115.346.

CONCLUSION

The judgment of the circuit court should be reversed and the Court should enter judgment for Shawn Brown and against Rhonda Shaw and Rich Chrismer, ordering Shaw to certify Shawn Brown as a candidate for mayor of the City of St. Peters at the April 6, 2004, election and directing Chrismer to place Shawn Brown's name on the ballot for that election as the first name on the ballot. In addition, this Court should make its preliminary writ of mandamus absolute.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

(A) It contains 11,729 words, as calculated by counsel's word processing program;

(B) A copy of this Brief is on the attached 3 1/2" disk; and that

(C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

_____
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing brief, along with the brief on a 3 ½ inch computer disk, were served by hand-delivery, on this 5th day of March, 2004, to V. Scott Williams and Randy Weber, City Attorney, Hazelwood & Weber, 200 North Third Street, St. Charles, Missouri, 63301, attorneys for Respondent Rhonda Shaw; Alex Bartlett, Husch & Eppenberger, LLC, 235 E. High Street, P.O. Box 1251, Jefferson City, Missouri 65102, attorney for Respondent Rhonda Shaw; Karen P. Hess, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri, 65102, attorney for Attorney General of the State of Missouri; and Joann Leykam, St. Charles County Counselor, 101 North Third Street, Room 216, St. Charles, Missouri, 63301, attorney for Respondent Chrismer.

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